No. 89-1645

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

M. MARK MENDEL,
DANIEL E. MURRAY, and M. MARK MENDEL, LTD.,
Petitioners,

v.

MARC I. SILVER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Does a federal court of appeals have jurisdiction to review an order that was not specifically designated in the notice of appeal where the notice of appeal specifically stated that the appeal was from a different order?

2. In deciding state law questions, may a federal court of appeals sitting in diversity disregard decisions of the state's intermediate appellate court where that state's highest appellate court exercises only discretionary jurisdiction?

3. May a federal court of appeals create a previously unrecognized state cause of action where the State Supreme Court has suggested that it would not recognize the cause of action and the intermediate state appellate court subsequently rejected the cause of action?

PARTIES TO THE PROCEEDING

The named appellant in the United States Court of Appeals for the Third Circuit, and the only respondent here is Marc I. Silver, an individual and owner of Marshall-Silver Construction Company, Inc., a failed general contracting company.

The named appellees in the court of appeals, and the only petitioners here, are M. Mark Mendel, Ltd., a Philadelphia lawfirm, and two of its employees, M. Mark Mendel and Daniel E. Murray.*

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*Pursuant to Rule 28.1, defendants state that M. Mark Mendel, Ltd. is the only corporate petitioner. M. Mark Mendel, Ltd. has no parent companies, subsidiaries or affiliates.

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This case presents an ideal opportunity for this Court to resolve three issues that have plagued the circuit courts of appeals: (1) whether a court of appeals has jurisdiction to review an order of the district court that was not designated in the notice of appeal; (2) on questions of state law, the degree of deference federal courts sitting in diversity should give to decisions of intermediate state courts; and (3) whether federal courts sitting in diversity can create a state cause of action that has been resisted by the controlling state's highest court and rejected by the state's intermediate court.

Two years ago this Court made clear that appellate jurisdiction is statutory not equitable. Here, in his notice of appeal appellant had designated one of two orders entered by the district court. The court of appeals affirmed the designated order, but reached back and reversed part of the undesignated order. Other courts of appeals have reached differing conclusions over how narrowly to draw the compass of Congress' grant of jurisdiction. Because of this uncertainty, here the panel reached state law questions that were not properly before it, and rendered hold-

ings that disregard decisions of the State's intermediate court and the State's highest court.

Since this Court 23 years ago last visited the question of how federal courts sitting in diversity should determine state substantive law, the gulf among the circuit courts of appeals continues to widen on what weight to give decisions of the host state's intermediate court. The quandary not only has divided the various courts of appeals but has invaded different panels of the same court of appeals. The result is chaos over what law is applied in diversity cases, forum shopping within the same geographic boundaries to evade hostile authority, and an assault on federalism. Here the panel went its own way and disregarded dispositive state appellate authority on the scope of the judicial privilege.

Regardless of what respect intermediate state court decisions receive, until recently federal courts had considered themselves bound by decisions of the state's highest court. With increasing frequency, however, federal courts like the panel here have assaulted the citadel of state law interpretation. Rather than apply state law, federal courts are starting to impose law that they think the states should adopt, moving the law back toward a pre-*Erie* federal common law. Here the panel adopted for Pennsylvania a tort of intentional infliction of emotional distress that the Pennsylvania Supreme Court has resisted and the Pennsylvania Superior Court has rejected.

Any one of these issues is worthy of this Court's attention. The combination of the three together, however, compels it.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania rendered two unreported orders in this case. The first order (A1) granted defendants' motion to dismiss and dismissed all claims except plaintiff's claim under a Pennsylvania statute. This final claim was dis-

missed by the district court's second order (A8), granting defendants' motion for judgment on the pleadings. The opinion of the United States Court of Appeals for the Third Circuit, *Silver v. Mendel*, (A9), as reported at 894 F.2d 598 (3d Cir. 1990), affirmed the district court's second order and affirmed in part and reversed in part the district court's first order.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) provides:

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This action arises from the failure of Marshall-Silver Construction Company, Inc. ("Marshall-Silver"), a business owned by respondent Marc I. Silver ("Silver"). Petitioners (referred to collectively as "Mendel"), M. Mark Mendel and Daniel E. Murray are lawyers practicing in the Philadel-

phia, Pennsylvania lawfirm of petitioner M. Mark Mendel, Ltd.

From 1983 to 1984, Marshall-Silver was in business as a general contractor. Barton & Co. ("Barton"), was a subcontractor on several of Marshall-Silver's projects. Mendel was both lawyer for, and a director of, Barton. During 1984 several disputes arose between Marshall-Silver and Barton relating to Marshall-Silver's refusal to pay Barton for completed work. After one meeting, Mr. Mendel wrote strongly worded demand letters on behalf of Barton demanding payment from Marshall-Silver. Approximately six months later when Marshall-Silver still had not paid Barton, Mendel on behalf of Barton and two other Marshall-Silver creditors, filed a Petition for Involuntary Bankruptcy against Marshall-Silver. The petition was dismissed after the petitioning creditors did not post the $850,000 in bonds set by the bankruptcy court.

After the petition was dismissed, Marshall-Silver filed a complaint in bankruptcy court against Barton and the other petitioning creditors. While the bankruptcy action was pending, Silver filed this lawsuit charging Mendel with violation of RICO and asserting state law claims for tortious interference with contract, wrongful use of civil proceedings, negligence, and intentional infliction of emotional distress.[1]

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1. In the name of Marshall-Silver, Silver concurrently filed another lawsuit against these same defendants alleging the same causes of action except intentional infliction of emotional distress. Jurisdiction in that action, styled *Marshall-Silver Construction Company Inc. and Silver Construction, Inc. v. M. Mark Mendel, Daniel E. Murray and M. Mark Mendel Ltd., ("Marshall-Silver")*, No. 88-7103 (E.D. Pa.), was premised solely on RICO. Marshall-Silver's RICO claims were dismissed on the merits by the district court. That decision was affirmed by the court of appeals because Marshall-Silver had not alleged a pattern of racketeering activity. *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987). On certiorari, this Court vacated and remanded, *Marshall-Silver*, 109 S. Ct. 3233 (1989), for further consideration in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). On remand, the court of appeals again affirmed this decision. 894 F.2d 593 (3d Cir. 1990).

By order entered March 25, 1987 on Mendel's motion to dismiss, the district court dismissed Silver's RICO claims and all of Silver's state law claims except wrongful use of civil proceedings under a Pennsylvania statute. (A1). By order entered November 21, 1988, the district court dismissed this remaining count on Mendel's motion for judgment on the pleadings. (A8).

Silver filed a notice of appeal which stated *in toto:*

> Notice is hereby given that Marc I. Silver, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on November 21, 1988. A copy of the Memorandum and Order entered on November 21, 1988 is attached hereto.

(A3).

A panel of the Court of Appeals for the Third Circuit affirmed the district court's November 21, 1988 Order designated in Silver's notice of appeal. *Silver v. Mendel,* (A8) 894 F.2d at 604. The court of appeals, however, affirmed in part and reversed in part the district court's March 25, 1987 Order even though that Order was not designated in Silver's notice of appeal. *Id.* (A1).

The panel's decision would reinstate Silver's claims for interference with contract and intentional infliction of emotional distress despite current decisions of the Pennsylvania Superior Court which extend the judicial privilege to the precise conduct alleged here and which bar these precise causes of action. In addition, the panel predicted that the Pennsylvania Supreme Court ultimately would recognize a tort for intentional infliction of emotional distress despite the Pennsylvania Supreme Court's recent hostility towards that tort, and the Pennsylvania Superior Court's outright rejection of that tort.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve conflicts among the courts of appeals about their own jurisdiction. Some courts of appeals, including the panel that ruled in this

case, have been recalcitrant in abiding the statutory jurisdictional limits of a notice of appeal. Here, the panel expanded its jurisdiction and decided two state law questions not properly before it.

On its substantive holdings, the panel disregarded decisions of Pennsylvania's intermediate appellate court and the Pennsylvania Supreme Court. Since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) this Court has resolved many of the problems federal courts have encountered in applying substantive state law in diversity cases. At least one critical question, however, continues to confound the federal courts: The degree of deference owed by federal courts to intermediate state courts when the state's highest court has not spoken. Although the Court addressed this issue in the 1940's, since then its few passing references to the issue have been more confusing than illuminating, and have created quixotic approaches among and within the circuit courts of appeals. This case presents an ideal opportunity for the Court to resolve this divergence and limit forum shopping within the same jurisdiction to obtain application of different substantive law.

This case also offers the Court a chance to reaffirm a related *Erie* principle — federal courts are to apply state substantive law not create it. Here the court of appeals ruled that despite the Pennsylvania Supreme Court resisting the tort of intentional infliction of emotional distress and the Pennsylvania Superior Court explicitly rejecting it, the tort nonetheless is a viable cause of action in Pennsylvania. Thus, turning traditional principles of federalism on their head, the court of appeals welcomed to Pennsylvania federal courts sitting in diversity a cause of action that the Pennsylvania state courts have rejected.

As demonstrated below, this case offers the Court the opportunity to resolve all three of these issues, each of which has vexed the circuit courts of appeals. The courts of appeals, and the litigants before them, desperately need guidance.

I. CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE JURISDICTIONAL LIMITS OF THE COURTS OF APPEALS.

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405 (1988), this Court made clear that Congress has granted the courts of appeals jurisdiction over only those matters designated in the notice of appeal. The courts of appeals, however, have wavered in their application of *Torres*.

The jurisdiction of the court of appeals is invoked by the filing of a notice of appeal. Federal Rule of Appellate Procedure 3(c) mandates: "The notice of appeal . . . shall designate the judgment, order *or* part thereof appealed from. . . ." (emphasis added). In *Torres v. Oakland Scavenger Co.*, this Court "granted certiorari to resolve . . . whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal." 108 S. Ct. at 2407 (footnote and citation omitted). In *Torres*, through a typographical error by an attorney's secretary, the notice of appeal used an "*et al.*" designation in the caption, and omitted from the text the name of one of sixteen parties taking the appeal. This Court held that because the notice of appeal did not designate all the parties, "the Court of Appeals was correct that it never had jurisdiction over [the undesignated party's] appeal." *Id.* at 2409.[2]

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2. The Supreme Court in *Torres* contrasted its jurisdictional holding with *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), where the Court had found that a notice of appeal from the denial of a Rule 59(e) motion to alter judgment, brought with it issues raised in a previous notice of appeal that was filed while the motion to alter judgment was pending in the district court.

> *Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the rule had been complied with.

Torres, 108 S. Ct. at 2408.

The various courts of appeals have given *Torres* divergent constructions. While some courts have understood *Torres* as confirming the strict jurisdictional threshhold of a notice of appeal, *see, e.g., United States v. Rivera Constr. Co.*, 863 F.2d 293 (3d Cir. 1988) (appeal from judgment did not include order not designated in notice of appeal),[3] others like the panel here have toiled to limit Torres and expand jurisdiction, *see, e.g., National Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Service*, 892 F.2d 814 (9th Cir. 1989) (jurisdiction over parties not designated in notice of appeal).[4] As these citations demonstrate, this divergence also has divided different panels

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3. *See also Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408 (7th Cir. 1989) (no jurisdiction over judgment in favor of third party defendants); *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988) (no jurisdiction over order not designated in notice of appeal); *Brandt v. Schal Assoc. Inc.*, 854 F.2d 948 (7th Cir. 1988) (no jurisdiction over portion of order not designated in notice of appeal); *Johnson v. Trustees of Western Conference of Teamsters Pension Trust Fund*, 879 F.2d 651 (9th Cir. 1989) (no jurisdiction over party not designated in notice of appeal); *Mariani-Giron v. Acevedo Ruiz*, 877 F.2d 1114 (1st Cir. 1989) (same); *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158 (11th Cir.), *reh'g denied*, 861 F.2d 1281 (11th Cir. 1988) (same); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) (same); *Mylett v. Jean*, 879 F.2d 1272 (5th Cir. 1989) (no jurisdiction over order against attorney where notice of appeal filed on behalf of party only); *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557 (7th Cir. 1988) (same); *De Luca v. Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988) (same); *In re Woosley*, 855 F.2d 687 (10th Cir. 1988) (same).

4. *See also Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 844 (1990) (jurisdiction over order entered against attorney where only party designated in notice of appeal); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988) (same). *Al-Jundi v. Estate of Nelson Rockefeller*, 885 F.2d 1060 (2d Cir. 1989) (jurisdiction over party not designated in notice of appeal); *Rendon v. A.T.&T. Technologies*, 883 F.2d 388 (5th Cir. 1989) (same); *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989) (same); *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223 (7th Cir. 1989) (same); *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989) (same).

within the same courts of appeals, including the Court of Appeals for the Third Circuit. The courts of appeals and the litigants before them need this Court to resolve the confusion lingering about the scope of appellate jurisdiction.

Here, the panel joined the camp restricting *Torres* and expanded its own jurisdiction. Plaintiff's notice of appeal stated in its entirety:

> Notice is hereby given that Marc I. Silver, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on November 21, 1988. A copy of the Memorandum and Order entered on November 21, 1988 is attached hereto.

(A3). The designated order and the attached Memorandum dismissed plaintiff's purported claim for wrongful use of civil proceedings, and denied plaintiff's cross-motion "to reinstate" contract interference claims. (A8). The panel determined that it had jurisdiction over the earlier March 25, 1987 Order because the designated order entered "JUDGMENT," of which the prior order was a part, and therefore, the panel "ha[d] no occasion to address the . . . Supreme Court's decision in *Torres*." *Silver, supra,* (A15) 894 F.2d at 601. This approach, however, is not faithful either to the statutory limits of appellate jurisdiction or to this Court's direction in *Torres*.

Federal Rule of Appellate Procedure 3(c) provides that an appellant may elect to appeal from: "the judgment, order, *or* part thereof. . . ." F.R.A.P. 3(c) (emphasis added). Here, the plaintiff designated the district court's second order. He did *not* designate either the judgment or the first order. Thus, the panel did not have jurisdiction over either the judgment, or the undesignated order. Its jurisdiction was limited to the designated order — the November 21, 1988 Order granting defendants' motion for judgment on the pleadings. *See Torres v. Oakland Scavenger Co., supra,* 108 S. Ct. 2405.

The panel's expansion of appellate jurisdiction reflects the divergence among the courts of appeals. Only this Court can unravel the confusion. Here, because the panel erroneously asserted jurisdiction over an undesignated order, it went on to disregard decisions of both Pennsylvania's intermediate court and Pennsylvania's highest court.

II. CERTIORARI SHOULD BE GRANTED IN ORDER TO END THE CONFUSION AMONG AND WITHIN THE COURTS OF APPEALS ABOUT THE DEGREE OF DEFERENCE TO BE PAID IN DIVERSITY CASES TO THE DECISIONS OF INTERMEDIATE APPELLATE COURTS.

In *Erie* this Court held that the Rules of Decision Act, now codified at 28 U.S.C. § 1652, required federal courts sitting in diversity to apply state law as "declared by its Legislature or by its highest court in a decision." 304 U.S. at 78. When the highest state court has not spoken on an issue, the federal court must predict what that state's highest court would do if confronted with the issue. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940).

While these principles are not controversial, they shed no light on a federal court's responsibility when the state's highest court has not spoken but its intermediate appellate court has. Since the premise of diversity jurisdiction is to ensure a fair application of law — not to change the substantive law — it would seem that a federal trial court should be bound by the same law as would its host state trial court.

> [W]ere the rule otherwise, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side," a state of affairs that "would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based."

Ferens v. John Deere Co., 110 S. Ct. 1274, 1285 (1990) (Scalia, J., dissenting) quoting *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 494 (1941). This accident is particularly injurious in a state such as Pennsylvania where state Supreme Court review is discretionary. *See* 42 Pa. C.S. § 724(a). On many issues, therefore, the intermediate appellate court is the court of last resort.

In the 1940s this Court consistently held that in the absence of clear direction from the state's highest court, the decisions of the state's lower courts are binding on federal courts sitting in diversity. *See Stoner v. New York Life Ins. Co.*, 331 U.S. 464, 467 (1940); *West v. A.T.&T. Co.*, 311 U.S. 223, 237 (1940); *Six Cos. of California v. Joint Highway District No. 13*, 311 U.S. 180, 188 (1940); *Fidelity Union Trust Co. v. Field, supra*, 311 U.S. 177-78. This was a clear, crisp, workable rule that the federal courts had little trouble applying.

In two later decisions, however, the rule began to crumble. In *King v. Order of United Commercial Travelers*, 333 U.S. 153, 160-61 (1948), the Court held that an unreported decision of a state *trial* court was entitled to "some weight" but was "not controlling" on the federal court sitting in diversity. *King* makes sense because a federal trial court should not be bound by decisions that would be merely persuasive in the coordinate state trial court.

In *Commissioner v. Estate of Bosch, supra*, 387 U.S. 465, the principle became murkier still. Although the holding of *Bosch* was narrow, its impact has been broad. In *Bosch* "[w]e hold that where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457. Thus, *Bosch* involved only the weight to be accorded a decision of a state *trial* court where application of federal law depends on state law. In dicta, however, the Court sug-

gested that decisions of intermediate state courts also might not be binding on federal courts:

> Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. . . . If there be no decision by [the highest court of the state] then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect it may be said to be, in effect, sitting as a state court.

Id. at 464-65. *See also Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). These pronouncements are contradictory. If the federal court is sitting as a state court, then it would be bound by a prior intermediate state court decision just as would be the state's trial courts and other intermediate courts. This does not square with there being at least some circumstances where the federal courts might not be bound by intermediate state courts. And, of course, *Bosch* did not deal with a federal court's duty in diversity cases to apply state law controlled by the *Erie* principles of federalism, but only with the question of the impact of a state trial court decision on questions of federal law.

Since *Bosch*, this Court has not addressed the question of the degree to which intermediate state court decisions are controlling on federal courts. It is this muddled canvas, therefore, on which the federal courts have been left to paint. The result among and within the courts of appeals has not always been art.

Although not susceptible to precise delineation, the approaches taken by the various courts of appeals fall roughly into three categories: (1) controlling deference; (2) moderate deference; and (3) little deference to intermediate state courts. Some courts of appeals consider themselves absolutely bound by intermediate state court decisions. For

example, in *Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983), the court stated that, "when the supreme court of a state has not spoken to a particular issue, the well-established practice of this Circuit is to follow the opinion of the highest court which *has* written on the matter."[5] Other courts of appeals, reflecting this Court's direction in *Field*, believe that they are bound by intermediate state court decisions "unless . . . convinced by other persuasive data that the highest court of the state would decide otherwise." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986).[6] A third group of courts of appeals regard intermediate state court rulings as less important in ascertaining state law. *See, e.g., Conway v. White Trucks*, 885 F.2d 90, 94 (3d Cir. 1989) (intermediate state court decisions are data for ascertain-

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5. *See also Lange v. Young*, 869 F.2d 1008, 1012 n.2 (7th Cir.), *cert. denied*, 109 S. Ct. 2440 (1989); *Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817, 827 (10th Cir. 1986); *Wieczorek v. Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1235 n.7 (5th Cir. 1982).

6. *See also Miller v. Pardner's, Inc.*, 893 F.2d 932, 934 (7th Cir. 1990); *Exxon Co. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, 676 (5th Cir. 1989), *reh'g denied*, 1990 U.S. App. LEXIS 1971 (5th Cir. 1990); *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1289 (10th Cir. 1989); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989); *Community Elec. Serv. of Los Angeles, Inc. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1240 (9th Cir.), *cert. denied*, 110 S. Ct. 236 (1989); *Matulin v. Village of Lodi*, 862 F.2d 609, 616 (6th Cir. 1988); *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 678 (2d Cir. 1985); *Klippel v. U-Haul Co. of Northeastern Michigan*, 759 F.2d 1176, 1181 (4th Cir. 1985).

ing state law in absence of controlling state supreme court precedent).[7]

As demonstrated by the above-cited cases, these categories are not uniform even within courts of appeals. It is not uncommon for different panels of the same court of appeals to apply different standards.

In this case the panel gave virtually no regard to decisions of Pennsylvania's intermediate appellate court and demonstrably misapplied the Pennsylvania judicial privilege.

Pennsylvania long has recognized an expansive judicial privilege protecting judges, advocates, parties, and witnesses from claims arising from any stage of a judicial proceeding. *See, e.g., Post v. Mendel*, 510 Pa. 213, 507 A.2d 351, 355 (1986); *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56 (1971); *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 514, 235 A.2d 576, 578 (1967), *cert. denied*, 392 U.S. 907, 88 S. Ct. 2063, *reh'g denied*, 393 U.S. 899, 89 S. Ct. 72 (1968); *Kemper v. Fort*, 219 Pa. 85, 67 A. 991 (1907); *Thompson v. McCready*, 194 Pa. 32, 45 A. 78 (1899); *Thompson v. Sikov*, 340 Pa. Super. 382, 490 A.2d 472 (1985); *Smith v. Griffiths*, 327 Pa. Super. 418, 423, 476 A.2d 22, 24 (1984); *Passon v. Spritzer*, 277 Pa. Super. 498, 419 A.2d 1258 (1980). Statements pertinent to judicial proceedings are privileged regardless of how false or malicious they might be, and all reasonable doubt must be resolved in favor of pertinence. *Greenberg v. Aetna Insurance Co., supra*, 427 Pa. at 514-15, 235 A.2d at 578.

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7. *See also First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1038 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 231 (1990); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 186 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990); *Sellers v. United States*, 870 F.2d 1098, 1101 (6th Cir. 1989); *Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 826 (8th Cir. 1983).

The principles underlying the privileges have been stated frequently and eloquently.

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests.

Binder v. Triangle Publications, Inc., supra, 442 Pa. at 323-24, 275 A.2d at 56. *See Pelagatti v. Cohen*, 370 Pa. Super. 422, 432, 536 A.2d 1337, 1344 (1987), *appeal denied*, 548 A.2d 256 (1988).

Here, the action that allegedly caused Silver harm was the filing of the involuntary bankruptcy petition. In reversing the dismissal of Silver's interference with contract and intentional infliction of emotional distress claims, the panel held:

> In this case it is alleged that the defendants caused an involuntary petition in bankruptcy to be filed without having probable cause to believe in the merit of the petition and for a purpose other than the securing of redress from the court.

Silver v. Mendel, (A20) 894 F.2d at 603. The panel concluded, therefore, that the Supreme Court of Pennsylvania would hold that the judicial privilege neither bars the claim for interference with contract relations or intentional infliction of emotional distress nor extends to filing a pleading without probable cause.

The Pennsylvania Superior Court, however, previously had reached precisely the opposite conclusion. *Brown v. Delaware Valley Transplant Program*, 372 Pa. Super. 629, 539 A.2d 1372 (1988) held:

> that the well-pleaded averments indicate that Attorney Heed's only involvement in the case was his preparation of

> the petition pursuant to his client's instructions, and that all the allegations against Heed are based on his actions in the course of providing legal representation. The claims against Heed are therefore barred by the absolute immunity which attaches to the actions of an attorney in representing a client in a judicial proceeding.
>
> Contrary to the assertion of appellants, the absolute privilege accorded an attorney in representation of a client in judicial proceedings is not limited to protection against defamation actions. The immunity bars actions for tortious behavior by an attorney other than defamation, so long as it was a communication pertinent to any stage of a judicial proceeding. Thus, the privilege barred claims for intentional interference with contractual or prospective contractual relations, as well as defamation. . . . The key is whether the pertinent communication was undertaken in connection with representation of a client in a judicial proceeding.

Id. at 633, 539 A.2d at 1374 (citations omitted).

Further, in *Pelagatti v. Cohen*, 370 Pa. Super. 422, 432, 536 A.2d 1337, 1344 (1987), *appeal denied*, 548 A.2d 256 (1988), the Pennsylvania Superior Court squarely held that under Pennsylvania law, the precise contract interference claims revived by the panel here *are* barred by the judicial privilege.[8] Still further, the Pennsylvania Superior Court has upheld the privilege against the other claim reinstated by the court of appeals here — intentional infliction of emotional distress. *Thompson v. Sikov*, 340 Pa. Super. 382, 490

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8. The *Pelagatti* holding also was consonant with the decision of virtually every court that presumably would have been of interest to the court of appeals here. *See, e.g., Blanchette v. Cataldo*, 743 F.2d 869, 877 (1st Cir. 1984); *Hoover v. Van Stone*, 540 F. Supp. 1118 (D. Del. 1982); *McLaughlin v. Copeland*, 455 F. Supp. 749 (D. Del. 1978), *aff'd*, 595 F.2d 1213 (3d Cir. 1979); *Middlesex Concrete Products & Excavating Corp. v. Carteret Indus. Ass'n*, 68 N.J. Super. 85, 172 A.2d 22, 25 (1961). *See also*, Prosser, Torts § 16 (4th Ed. 1971). *Cf. Lewis v. Swenson*, 126 Ariz. 561, 564, 617 P.2d 69, 72 (1980) (O'Connor, J.), quoting *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 822, 372 N.E.2d 685, 690 (1978).

A.2d 472 (1985). In addition, the Pennsylvania Superior Court sitting *en banc* had recently reaffirmed the expansiveness of the judicial privilege under Pennsylvania law. *Moses v. McWilliams*, 379 Pa. Super. 150, 549 A.2d 950 (1988) (*en banc*) (privilege bars claim for breach of doctor's loyalty to patient), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989).

Despite this consistent and recent authority by the Pennsylvania Superior Court, including an *en banc* decision by that court, and despite the fact that the Pennsylvania Supreme Court had denied review in all three of the recent cases, the court of appeals "conclude[d] that the Pennsylvania Supreme Court would find that the defendants' alleged conduct was not protected by the judicial privilege." *Silver v. Mendel*, (A19) 894 F.2d at 603 (footnote omitted). The court of appeals dispensed with the recent Pennsylvania Superior Court decisions in a footnote with the circular reasoning that they were "distinguishable in that all the communications at issue in them occurred within the 'regular course of justicial proceedings,' and protection of them was, accordingly, necessary to permit the proper functioning of the judicial system." (A22) *Id.* at 604 n.11.

There can be nothing more central to the "regular course of justicial proceedings," however, than filing a pleading. *See Brown v. Delaware Valley Transplant Program, supra*, 372 Pa. Super. at 633. If the judicial privilege could be evaded merely by alleging that pleadings were filed without probable cause or for an improper purpose, the privilege would have no meaning at all.[9] *See, e.g., Silberg v. Anderson*, 50 Cal.3d 205, 266 Cal. Rptr. 638, 645 (1990)

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9. Filing a pleading without probable cause and for an improper purpose are material to a separate cause of action under a Pennsylvania statute for wrongful use of civil proceedings, *see* 42 Pa. C.S. § 8351, which would not be barred by the privilege, but the Court of Appeals correctly affirmed the decision of the district court dismissing that claim for lack of standing. (A22), 894 F.2d at 604.

("interest of justice" requirement "would permit derivative tort suits in many, if not most cases on ground that otherwise privileged communication was not made for the purpose of promoting justice, a charge easily and quickly made").

Here, there is no doubt that if plaintiff had filed his action in state court it would not have survived. Thus, in deciding the scope of the judicial privilege under Pennsylvania law, the panel gave virtually no weight to decisions of the Pennsylvania Superior Court which squarely hold that the privilege bars the precise causes of action reinstated here, as well as the precise conduct on which those causes of action are based. Further, the court of appeals gave the privilege an unduly restrictive scope in conflict with the clear direction of Pennsylvania's highest court.

Thus, in Pennsylvania substantive privilege law changes depending whether the case is filed in state court or federal court. This result is in direct conflict with *Erie*.[10]

Confusion among and within the courts of appeals enabled the panel in this case to depart from the direct holdings of Pennsylvania's intermediate courts, and the clear direction of Pennsylvania's highest court. This unpredictability and conflict can be corrected only by this Court.

III. CERTIORARI SHOULD BE GRANTED TO REAFFIRM *ERIE*'S TEACHING THAT FEDERAL COURTS ARE BOUND BY DECISIONS OF A STATE'S HIGHEST COURT.

At one time, federal courts sitting in diversity were comfortable with *Erie*'s holding that the federal courts were

10. This conflict is particularly pressing given the fact that diversity cases already account for approximately 25% of the federal courts' civil case load, consuming judicial resources equivalent to the workload of 193 district judges and 22 courts of appeals judges, at a cost estimated to be $131 million annually. Federal Courts Study Committee, Tentative Recommendations for Public Comment (December 22, 1989) at 9.

bound by the pronouncements of the controlling state's highest court. No longer is that the case.

Some courts of appeals consider themselves absolutely bound by *Erie* to apply the decisions of the highest court of the state. *See, e.g., Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 553 n.3 (3d Cir. 1985); *Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 551 (5th Cir. 1983); *see also Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980) ("[i]n matters of Texas substantive law, our relationship to the Texas Supreme Court is all but identical to that of a Texas intermediate appellate court"). Other courts do not feel so bound and sporadically depart from the decisions of the highest court of the state whose law they are applying. *See, e.g., Miller v. Premier Corp.*, 608 F.2d 973, 985-87 (4th Cir. 1979); *Mason v. American Emery Wheel Works*, 241 F.2d 906, 909-10 (1st Cir.), *cert. denied*, 355 U.S. 715, 78 S. Ct. 17 (1957). *See also Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967).

This dichotomy appears to have sprung because this Court on at least two occasions has suggested that some circumstances might exist in which decisions of a state's highest court may not be controlling on federal courts sitting in diversity. The Court first suggested that the *Erie* rule might not be absolute in *Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, (1943): "[t]he rulings of the Supreme Court of Florida . . . must be taken as controlling here unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future. . . ." *Id.* at 234. Similarly, in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S. Ct. 273 (1956), the Court held that a 1910 decision of the highest court of Vermont was controlling, but qualified its holding by adding: "[t]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question,

no legislative development that promises to undermine the judicial rule." *Id.* at 205.

Here, the panel disregarded a recent explication of the status of the tort of intentional infliction of emotional distress in Pennsylvania by the Pennsylvania Supreme Court, and breathed new life into an earlier court of appeals' interpretation of Pennsylvania law that had since been discredited by the Pennsylvania Supreme Court.

Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988 (1987), involved a claim for intentional infliction of emotional distress arising from a cemetery attempting to coerce additional payments by threatening not to permit installation of a grave marker or an unveiling ceremony, and refusing to care and maintain the grave sites of the plaintiffs' infant children. In upholding dismissal, the Pennsylvania Supreme Court was less than enamored of this tort.

> It is interesting to note that this tort is not truly a judicial development simply "restated" by the American Law Institute. "Although it relies on prior cases, the *Restatement* in this area has generated the law more than it has restated it." Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DePaul L. Rev. 275, 276 (1977).

Kazatsky, 515 Pa. at 194-195 n.5.

The *Kazatsky* Court quoted extensively from Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 52-53 (1982) ("Givelber"), pointing out, among other things: (1) the nebulous contours of the proposed tort:

> "The term 'outrageous' is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct."

Kazatsky, 515 Pa. at 195, quoting, Givelber; (2) the peculiarity of courts imposing liability where an average member of the community is driven to exclaim, "Outrageous!"

> "This is a strange description of a rule of law. Those situations in which 'average members of the community;' (sic) are up in arms over the outrageous conduct of individuals are situations in which the evenhanded application of law is threatened. A central goal of due process is to ensure that individuals are not judged by the 'passion and prejudice of the moment,' but are rather evaluated by rules of universal applicability, fairly and evenhandedly applied. To suggest, as the *Restatement* does that civil liability should turn on the resentments of the average member of the community appears to turn the passions of the moment into law."

Kazatsky, 515 Pa. 196, quoting Givelber; and (3) the unsuitability of courts as arbiters of public taste:

> "[D]espite claims that they serve as 'society's conscience,' courts may have no particular wisdom with respect to what is socially intolerable."

Kazatsky, 515 Pa. at 195, quoting Givelber.[11]

As confirmed by the Pennsylvania Superior Court "*Kazatsky* makes clear that the tort of intentional infliction of emotional distress is not recognized in Pennsylvania." *Ford v. Isdaner,* 374 Pa. Super. 40, 44, 542 A.2d 137, 139 (1988). See also Daughen v. Fox, 372 Pa. Super. 405, 411-12, 539 A.2d 858 (1988); *Buczek v. First National Bank of Mifflintown,* 366 Pa. Super. 551, 531 A.2d 1122 (1987).

Undaunted, the panel here found that the Pennsylvania Supreme Court would welcome the tort of inten-

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11. The Pennsylvania Supreme Court also held that any claim for intentional infliction of emotional distress necessarily would require competent medical evidence of injury. *Kazatsky, supra,* 515 Pa. at 197. No such allegation was made here.

tional infliction of emotional distress.[12] In doing so the panel relied on a prior panel decision which in turn had clutched to a pre-*Kazatsky* court of appeals' decision which was expressly criticized by the Pennsylvania Supreme Court.

> Although the opinion of the Pennsylvania Supreme Court in *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 527 A.2d 988 (1987) has caused considerable speculation as to whether Pennsylvania will recognize the tort of intentional infliction of severe emotional distress, this court has recently predicted that Pennsylvania's highest court will ultimately embrace it. *Williams v. Guzzardi*, 875 F.2d 46, 51 (3d Cir. 1989).

Silver, supra, (A26) 894 F.2d at 606. The *Williams* panel in turn had relied for this conclusion on *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (in banc) which the Pennsylvania Supreme Court had cited as an example of a misinterpretation of Pennsylvania law.

> Various other courts have *incorrectly* taken the view that this Court has adopted section 46. *See, e.g., Chuy v. Philadelphia Eagles Football Club*, ...

Kazatsky, 515 Pa. 185, n.1, 527 A.2d 988-89 n.1 (emphasis added).

Thus, despite clear guidance from the Pennsylvania Supreme Court, the federal courts continue to embrace for Pennsylvania a tort that Pennsylvania does not want. The panel simply substituted its own view of what Pennsylvania law should be for what Pennsylvania law actually is and reasserted its view of Pennsylvania law even after the

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12. Tellingly, although the court of appeals in this case recognized that at the very least "Pennsylvania's formulation of the tort may not exactly track that of the Restatement (Second)," *Silver, supra*, (A26), 894 F.2d at 606 n.16, the panel nonetheless relied exclusively on an illustration from a comment of the Restatement (Second) in finding that an alleged extortionate threat "gives rise to liability when it occasions severe emotional distress." *Id.* (A27) at 606 and n.18.

Pennsylvania Supreme Court had rejected the federal line of authority as incorrect.

The panel's disregard of decisions of the highest court of Pennsylvania reflects the uncertainty that has developed in the fifty-one years since *Erie*. And yet the panel here is not alone among the courts of appeals.

Federal courts have no place legislating state law. This type of paternalism is the precise assault on federalism *Erie* was meant to ward off. This Court should grant review to resolve this uncertainty among the courts of appeals and to steer a true course.

CONCLUSION

In deciding this case, the panel impermissibly expanded its appellate jurisdiction to reach issues which it then decided in conflict with *Erie*. On deciding questions of Pennsylvania law, the panel heeded neither the decisions of the Pennsylvania Supreme Court nor decisions of the Pennsylvania Superior Court. Nor in doing so was this panel unique among courts of appeals.

This case presents a clean record on which this Court can resolve the scope of appellate jurisdiction, and the deference federal courts sitting in diversity owe to decisions of the controlling state's highest court and intermediate courts. Each of these issues has vexed the courts of appeals, which are in desperate need of this Court's direction.

Thus, Petitioners respectfully request that the Writ be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARSHALL-SILVER CONSTRUCTION COMPANY, INC. and SILVER CONSTRUCTION INC.	:	CIVIL ACTION
v.	:	
M. MARK MENDEL, Individually, DANIEL E. MURRAY, Individually, and M. MARK MENDEL, LTD.	:	NO. 86-7103

MARK I. SILVER	:	CIVIL ACTION
v.	:	
M. MARK MENDEL, Individually, DANIEL E. MURRAY, Individually, and M. MARK MENDEL, LTD.	:	NO. 86-7104

O R D E R

AND NOW, this 19th day of MARCH, 1987, upon consideration of the defendants' motions to dismiss and the plaintiffs' response thereto and after a hearing, it is

ORDERED

1. The motion is GRANTED as to the RICO claims in both cases.
2. All remaining claims in Civil Action 86-7103 are dismissed without prejudice because there is no independent basis for the exercise of this court's jurisdiction.

3. With the exception of the claim based on 42 Pa. C.S.A. § 8351 all state law claims in Civil Action 86-7104 are dismissed.

4. The motion is DENIED as to the claim grounded on the wrongful use of civil proceedings. 42 Pa. C.S.A. § 8351.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

FILED: March 24, 1987
ENTERED: March 25, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC I. SILVER	:	CIVIL ACTION
vs.	:	
M. MARK MENDEL, Individually, DANIEL MURRAY, Individually, and M. MARK MENDEL, LTD.	:	NO. 86-7104

NOTICE OF APPEAL

Notice is hereby given that Marc I. Silver, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on November 21, 1988. A copy of the Memorandum and Order entered on November 21, 1988 is attached hereto.

WHITE AND WILLIAMS
Attorneys for Plaintiff,
Marc I. Silver

By _____
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FILED: December 13, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC I. SILVER	:	CIVIL ACTION
v.	:	
M. MARK MENDEL, Individually,	:	
DANIEL MURRAY, Individually,	:	
and M. MARK MENDEL, LTD.	:	NO. 86-7104

MEMORANDUM

McGLYNN, J. NOVEMBER 18, 1988

On December 28, 1984, M. Mark Mendel, Ltd. filed a Petition for Involuntary Bankruptcy against Marshall-Silver Construction Company, Inc. in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Since an Involuntary Petition requires three creditors, defendant included on the petition Nester Brothers and R.J. Skelding Company. The Bankruptcy Court ordered each of the petitioning creditors to post a bond. They failed to post the required bond, and the Court dismissed the Bankruptcy Petition in 1985.

On December 5, 1986, plaintiff filed this action along with a related action captioned Marshall-Silver Construction Company, Inc. and Silver Construction, Inc. v. M. Mark Mendel, Ltd., Civil Action No. 86-7103.

FILED: November 21, 1988

In response to the two complaints, defendants filed a consolidated motion to dismiss both actions. On March 25, 1987, the court entered an Order dismissing all of the claims of the *Marshall-Silver* action and dismissing all but Count III of this action. The complaint in the *Marshall-Silver* action alleged only federal question jurisdiction, so after dismissing the federal RICO claim on the merits, the court dismissed the state law claims on jurisdictional grounds. Following the court's ruling, plaintiffs in the *Marshall-Silver* action filed a Notice of Appeal. The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court dismissing plaintiffs' claims.

In the present action, plaintiff's complaint was comprised of the following six counts:

Count I:	Interference with Existing Contractual Relations
Count II:	Interference with Prospective Contractual Relations
Count III:	Wrongful Use of Civil Proceedings
Count IV:	Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1987)
Count V:	Intentional Infliction of Emotional Distress
Count VI:	Negligence

The complaint in this action alleged both federal question jurisdiction and diversity jurisdiction. By order dated March 19, 1987, the District Court dismissed the federal RICO claim and four out of five state law claims on the merits.

Presently before the court in this action is the motion presented by defendants M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd., asking this court to enter

an Order for judgment on the pleading dismissing the Complaint of Mark I. Silver. Plaintiff filed a response in opposition to defendants' motion for judgment on the pleadings and a cross-motion to reinstate Counts I and II of the Complaint. Plaintiff's cross-motion to reinstate Counts I and II will be denied.

Plaintiff's remaining claim is one for wrongful use of civil proceedings based upon defendants' filing of a Petition for Involuntary Bankruptcy against Marshall-Silver Construction Company, Inc. of which plaintiff was the sole shareholder. *Because the petition was filed against plaintiff's company and not against plaintiff, plaintiff lacks standing to bring a claim for wrongful use of civil proceedings.*

Pennsylvania's codification of the tort of wrongful use of civil proceedings (42 Pa. Cons. Stat. Ann. § 8351 (Purdon 1982) (commonly referred to as the Dragonetti Act) provides in pertinent part:

> (a) Elements of Action. — A person who takes part in the procurement, initiation, or continuation of civil proceedings *against another* is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa. Cons. Stat. Ann. § 8351 (Purdon 1982) (emphasis added).

By its express terms, "a person who takes part in the procedure, initiation or continuation of civil proceedings *against another* is subject to liability *to the other* for wrong-

ful use of civil proceedings." 42 Pa. C.S.A. § 8351(a) (emphasis added). Thus, only a defendant to the prior proceeding can bring a Dragonetti claim. *See Lessard v. Jersey Shore State Bank*, No. 87-0482, slip. op. at 2-5 (M.D. Pa. April 13, 1988) (Kosik, J.) (because plaintiff was not a party to the underlying action, she lacks the requisite standing to bring a cause of action under 42 Pa. C.S.A. § 8351). *See also, Mintz v. Bur*, 6 D. & C. 3d 779 (Montgomery Cty. 1977), *aff'd per curiam*, 257 Pa. Super. 641, 390 A.2d 311 (1978). In *Mintz*, the court determined that "[w]hile the cases cited by plaintiffs may be authority for the proposition that a person who is not a party of record in a prior lawsuit can still be held liable for malicious use of process or abuse of process where that person is shown to have been the instigator of the original suit, these cases do not support plaintiffs' contention that it is not necessary that they have been named as a defendant in the original action in order to maintain the instant cause of action." *Id.* at 785.

Since the Petition for Involuntary Bankruptcy was not filed against the plaintiff, plaintiff does not have standing to bring a claim against defendants for wrongful use of civil proceedings. Consequently, this court will grant defendants' motion for judgment on the pleadings.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC I. SILVER	:	CIVIL ACTION
v.	:	
M. MARK MENDEL, Individually,	:	
DANIEL MURRAY, Individually,	:	
and M. MARK MENDEL, LTD.	:	NO. 86-7104

O R D E R

AND NOW, this 18th day of NOVEMBER, 1988, upon consideration of the defendants' motion for judgment on the pleadings and the plaintiff's cross-motion to reinstate Counts I and II, it is

ORDERED

1. that defendants' motion is GRANTED and JUDGMENT is entered in favor of the defendants M. Mark Mendel, Individually, Daniel Murray, Individually, Daniel Murray, Individually and M. Mark Mendel, Ltd. and against the plaintiff Marc I. Silver.

2. that the plaintiff's motion to reinstate Counts I and II is DENIED.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

ENTERED: November 21, 1988

Filed: January 18, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1935

SILVER, MARC I.,

Appellant

vs.

MENDEL, M. MARK, Individually,
MURRAY, DANIEL E., Individually,
and M. MARK MENDEL, LTD.

On Appeal From the United States District Court For the Eastern District of Pennsylvania
(Civil Action No. 86-7104)

Argued April 10, 1989

BEFORE: HIGGINBOTHAM, STAPLETON, and ROSENN, *Circuit Judges*

(Opinion Filed January 18, 1990)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*.

I.

This is an appeal from a final order in a diversity case dismissing appellant Silver's complaint against appellees M. Mark Mendel, Daniel Murray, individually, and M. Mark Mendel, Ltd. ("the defendants"). We are presented with three principal issues: whether we have jurisdiction to review a non-final March 25, 1987 order dismissing counts I, II, V and VI[1] of the complaint;[2] whether Silver's claims of intentional interference with both existing and prospective contractual relations are barred by an absolute judicial privilege; and whether Silver states a claim for intentional infliction of severe emotional distress. We conclude that we have jurisdiction, that the judicial privilege does not bar the intentional interference claims, and that Silver's complaint does allege conduct sufficiently outrageous to state a claim under Pennsylvania law for intentional infliction of severe emotional distress.

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1. Count I of the complaint alleges interference with existing contractual relations. Count II alleges interference with prospective contractual relations. Count III alleges wrongful use of civil proceedings. Count IV alleges a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. Count V alleges intentional infliction of emotional distress. Count VI alleges a negligence claim.

2. Although Silver has preserved his position on Count IV before us, he did not argue it on appeal in light of our subsequently vacated decision in the related case of *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987), *vacated*, 109 S. Ct. 3233 (1989). We have since affirmed the dismissal of the Marshall-Silver's RICO claim on remand, *Marshall-Silver Construction Co. v. Mendel*, -- F.2d -- (3d Cir. Jan. --, 1990), and thus will affirm the dismissal of Silver's RICO claim in this case on the same grounds.

II.

In reviewing an order dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), we must take as true all the factual allegations in the complaint, and construe the complaint liberally in the complainant's favor. *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The following narrative account reflects this perspective.

M. Mark Mendel, Ltd. is a legal service corporation incorporated under the laws of the Commonwealth of Pennsylvania. M. Mark Mendel, a Pennsylvania citizen, is Chairman of the Board and an owner of Barton Engineering ("Barton"); he is also a shareholder, officer, and director of Mendel, Ltd. Daniel Murray, a Pennsylvania citizen, is also an officer of Barton as well as being an attorney who is either a shareholder or employee of Mendel, Ltd.

Silver was the principal of a construction company ("the Construction Company") primarily engaged in the business of serving as general contractor for the building of nursing homes. In addition, Silver derived substantial income from consulting work he did individually for developers and owners of nursing homes and, because of his close identification with the Construction Company, he was often invited to participate in his individual capacity as an equity partner with these developers. These sources of income were independent of his income from the Construction Company.

One of the subcontractors hired by the Construction Company was Barton. In 1984, a series of disputes between Barton and the Construction Company arose. On June 29, 1984, Mendel met with Silver at his office and threatened to: destroy Silver's business; destroy his ability to earn a living; and have him physically injured. By letter dated July 2, 1984, Mendel confirmed some of these threats. Spe-

cifically, the letter threatened to: charge Silver with improper activity and manipulation on the drawdown of funds provided for the nursing home development by the U.S. Department of Housing and Urban Development; obtain a temporary restraining order on all of Silver's projects; request action from the U.S. Attorney; and seek the appointment of a receiver for the Construction Company. Mendel concluded his letter by stating that

> [w]e may not get paid in money, but we will get paid in the visceral good feeling that we have taken you out of the market and prevented you from further victimizing honest businessmen. If you think this letter was written in anger, it was not. It was written after careful deliberation and evaluation of what you people really appear to be doing.

29a. In a subsequent letter to appellant dated July 3, 1984, Mendel stated that "I assure you, and this is a threat, and don't kid yourself; your attorney may have told you I can't shut you down, but I'll shut you up and I'll finish you off in the building business. . . . You have only one single option and one only. It is my office or suffer the wrath and take your licking, which I assure you you are going to get." 31a; 32a. The purpose of these threats was to coerce Silver or the Construction Company into making the disputed payments to Barton.

The complaint also alleges that Mendel made good on his threats by causing Barton to file, without probable cause, a Petition for Involuntary Bankruptcy against the Construction Company. The petition was signed by Murray and filed by Mendel, Ltd. on or about December 28, 1984. Two of the creditors who appeared on the petition, Nester Brothers and R.J. Skelding Company had not authorized the Mendel firm or Barton to include them as petitioning creditors before the Bankruptcy Court. The petition was ultimately dismissed because the petitioners refused to post the approximately $850,000 bond set by the court. However, as a result of the filing of the petition, Dunn & Brad-

street, The Philadelphia Inquirer, Philadelphia Business Journal, and the Legal Intelligencer reported that the Construction Company was insolvent. The widespread publicity ensuing from the filing of the petition had dire consequences for both Silver and the Construction Company. Silver personally suffered the following financial injuries from the defendants' conduct: 1) the loss of a $100,000 development fee to be paid by Shermark Partnership to Silver individually; 2) the loss of a 21% equity interest in Dayton Manor with an estimated value of $250,000; and 3) the loss of his ability to continue his personal business ventures, estimated at $300,000. In addition, the defendants' conduct caused Silver to experience severe emotional distress.

In count I, pertaining to interference with existing contractual relations, the complaint alleges that the filing of the petition prevented Silver from completing three specific existing contracts. Count II, dealing with the loss of prospective contractual relations, alleges that the filing of the petition caused appellant to lose his bonding capacity, interfered with his ability to obtain credit and damaged his reputation, thereby depriving him of the ability to secure specified construction contracts.

III.

Federal Rule of Appellate Procedure 3(c) requires a notice of appeal to "designate the judgment, order or part thereof appealed from." The defendants stress that Silver's notice of appeal refers only the November 21, 1988 order that dismissed count III alleging wrongful use of civil proceedings. They contend that the notice of appeal, accordingly, did not effect an appeal from the district court's order of March 25, 1987 that dismissed counts I, II, V, and VI of the complaint. Since the time for appeal from the dismissal of those four counts expired 30 days after the November 21, 1988 order without the filing of a notice of appeal making

reference to the order dismissing them, defendants contend that this court lacks jurisdiction to review the dismissal of Silver's claims for interference with existing and prospective contractual relations and for intentional infliction of emotional distress. Defendants add, for good measure, that the recent Supreme Court decision in *Torres v. Oakland Scavenger*, 108 S. Ct. 2405 (1988) (failure to specify a party in the notice of appeal deprived a Court of Appeals of jurisdiction with respect to that party), precludes this court from applying a harmless error analysis to this jurisdictional defect.

The district court's order of November 21, 1988, not only granted the defendants' motion with respect to count III but also entered "JUDGMENT . . . in favor of the defendants M. Mark Mendel, Individually, Daniel Murray, Individually and . . . M. Mark Mendel, Ltd. and against the plaintiff Marc I. Silver". 313a. An indispensable element of the judgment so entered was the court's previous dismissal of counts I, II, V and VI. We hold that we have jurisdiction to review the judgment entered on November 21, 1988, including all decisions of the district court necessary to it. *See Murray v. Commercial Un. Ins. Co.*, 782 F.2d 432, 434-435 (3d Cir. 1986) (holding that an appeal from an order granting summary judgment on the last count of a complaint also encompasses the interlocutory order granting summary judgment on the other two counts of the complaint where the earlier order was not appealable and the parties had briefed all the issues). Since Silver fully complied with Rule 3(c) with respect to all issues which he raises on appeal, we have no occasion to address the doctrine of harmless error or the Supreme Court's decision in *Torres*.

IV.

A.

Although the Pennsylvania Supreme Court has explicitly adopted the Restatement (Second) of Torts' formulation

with respect to the tort of interference with *existing* contractual relations, *Adler, Barish v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1183-1184 (1978), it has not adopted the Restatement (Second)'s formulation with respect to interference with *prospective* contractual relations.[3] In *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 471 (1979), written two years after the final version of the Restatement (Second) was published, the Pennsylvania

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3. Section 766B of the Restatement (Second) of Torts (1977) provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Section 767 of the Restatement (Second) then provides a list of several factors that are to be considered in determining whether the interference is "improper." That section provides:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

Supreme Court referenced the Restatement (Second) section dealing with the latter, *see id.* at 470, but retained the four elements of the tort in the language of the Restatement (First) of Torts that it had adopted in *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 898 (1971).[4] These four elements are: 1) a prospective contractual relation; 2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; 3) the absence of privilege or justification on the part of the defendant; and 4) the occasioning of actual damage resulting from the defendant's conduct. In view of the Pennsylvania Supreme Court's opportunity in *Thompson* to adopt the Restatement (Second), its failure to do so, and its reaffirmation of the tort's

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4. Section 766 of the Restatement (First) of Torts (1939) provides:

> Except as stated in Section 698 [re contracts for marriage], one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relation with another
>
> is liable to the other for the harm caused thereby.

Section 767 of the Restatement (First) outlines the factors to be considered in determining whether an act is privileged and provides:

> In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the nature of the expectancy with which his conduct interferes,
>
> (c) the relations between the parties,
>
> (d) the interests sought to be advanced by the actor and
>
> (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

four elements derived from the Restatement (First),[5] we are constrained to analyze appellant's claim using the four elements set forth in *Thompson*, although we think the result would not be different if we followed the Restatement (Second) in this case.[6]

B.

The first *Thompson* element required Silver to allege that he had a prospective contractual relation with which the defendants interfered. Silver specifies several contracts and bids, then in the negotiating or drafting phase, that were not completed because of defendants' actions. The second element, requiring the purpose or intent to harm the plaintiff by preventing the relation from occurring, is satisfied by Silver's allegations that "(d)efendants' actions were done with the knowledge and intent to interfere with plain-

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5. Although one panel of the Pennsylvania Superior Court has adopted the Restatement (Second) formulation, stating that "without justification privilege" is just another way of saying "improper" and applying section 767 of the Restatement (Second)'s "factor" analysis, *Yaindl v. Ingersoll-Rand*, 281 Pa. Super. 560, 422 A.2d 611, 621-622 (1981), two more recent panels have either relied on the four *Thompson* elements or have analyzed the tort with reference to "absence of justification or privilege." *Vintage Homes v. Levin*, ___ Pa. Super. ___, 554 A.2d 989, 994 (1989) (referencing *Thompson*'s four elements); *Gordon v. Lancaster Osteopathic Hosp. Ass'n, Inc.*, 340 Pa. Super. 253, 489 A.2d 1364, 1370 (1985) (analyzing the tort with reference to "absence of justification or privilege.").

6. The use of the term "improper" in the Restatement (Second) apparently allows a greater number of factors to be considered in deciding whether certain conduct is privileged. It also apparently allows the burden of demonstrating privilege justification to be placed on the defendant. In Pennsylvania, however, it is clear that the burden is on the plaintiff to show an absence of privilege justification. Although we follow the *Thompson* court's four elements in this case, we do not think that the outcome would be different if the Restatement (Second)'s formulation were followed. Here, the main issue is the applicability of a well-established privilege, the judicial privilege.

tiff's ability to obtain business" and "were willful, malicious and solely for the purpose of destroying plaintiff". 17a. Silver also makes detailed factual allegations to support this alleged intent to harm. With respect to the fourth element, causally related damage, Silver alleges that he, individually, sustained actual damages resulting from defendants' conduct in the loss of the above mentioned contracts which, with other prospective losses, totalled in excess of $300,000 annually. Thus, as to three of the four elements of the interference with prospective contractual relations tort, there is no doubt that Silver's complaint states a cause of action. Defendants do not argue otherwise.

The remaining issue is whether Silver alleged facts sufficient to meet the third element set forth in *Thompson*, the absence of a privilege or justification. Defendants argue that they are protected from liability in this case because the actions for which Silver seeks to hold them liable are protected by the absolute immunity of the judicial privilege.

As an initial matter, we conclude that although Silver did not use the words "without privilege or justification" in his complaint, he has alleged sufficient facts to allow us to determine whether a privilege protects the defendants' alleged actions. We further conclude that the Pennsylvania Supreme Court would find that the defendants' alleged conduct was not protected by the judicial privilege.[7]

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7. The Supreme Court of Pennsylvania has also offered guidance as to when conduct which is not clearly protected by an established privilege is nonetheless "justified." In *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971), the court stated that:

> The absence of privilege or justification in the tort under discussion [interference with prospective contractual relations] is closely related to the element of intent. As stated by Harper & James, The Law of Torts, § 6.11, at 513: ". . . where, as in most cases, the defendant acts at least in part for the purpose of protecting some legitimate interest which conflicts with that of the plaintiff, a line must

In *Post v. Mendel*, 510 Pa. 213, 507 A.2d 351 (1986), the Pennsylvania Supreme Court noted that immunity under the judicial privilege doctrine applies only to liability based on "those communications which are issued *in the regular course of judicial proceedings* and which are *pertinent and material to the redress or relief sought*." 507 A.2d at 353 (emphasis in original). This is consistent with the rationale identified by the *Post* court as supporting the privilege: the "privilege exists because there is a realm of communication essential to the exploration of legal claims that would be hindered were there not the protection afforded by the privilege."[8] 507 A.2d at 355. Without the protection of the privilege for communications necessary to such exploration, access to the courts would be impaired, witnesses would be intimidated and lawyers' efforts in pursuit of their clients causes would be chilled. *Id.* at 355.

In this case it is alleged that the defendants caused an involuntary petition in bankruptcy to be filed without having probable cause to believe in the merit of the petition and for a purpose other than the securing of redress from the court. Based on these allegations, we are confident that the Supreme Court of Pennsylvania would conclude that

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be drawn and the interests evaluated. This process results in according or denying a privilege which, in turn, determines liability." What is or is not privileged conduct in a given situation is not susceptible of precise definition. Harper & James refer in general to interferences which "are sanctioned by the 'rules of the game' which society has adopted", and to "the area of socially acceptable conduct which the law regards as privileged". . . .

Although not argued separately on appeal, we conclude not only that appellees' conduct was not protected by the judicial privilege, but also that it was otherwise without legal justification, appellees' conduct was clearly not sanctioned by society's "rules of the game."

8. We do not express an opinion on whether, if defendant's conduct had been in the regular course of justice, the Supreme Court of Pennsylvania would extend the protection of the privilege beyond defamation actions to the ones at issue here.

liability imposed in Silver's interference with prospective contractual relations claim would not be predicated on any communication "issued in the regular course of judicial proceedings," "pertinent and material to the . . . relief sought," or "essential to the exploration of claims" in litigation.

The judicial privilege has long existed in jurisdictions which, like Pennsylvania, recognize the tort of wrongful use of civil proceedings. These two policies protection of communications necessary to the litigation of claims and imposition of liability for wrongful use of civil proceedings — can coexist because imposition of liability for the wrongful use of civil proceedings occurs only when litigation is instituted both without probable cause *and* primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based[9] and because, when these requirements are met,

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9. Section 674 of the Restatement (Second) § 674 defines the tort of wrongful use of civil proceedings as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

Section 678 describes a special application of § 674 liability as follows:

> One who takes an active part in initiating against another civil proceedings alleging the other's insanity or insolvency is subject to liability caused thereby, if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

See The Dragonetti Act, 42 Pa. C.S.A. §§ 8351-8354.

immunity for the filing of the complaint is not necessary to further the interests protected by judicial immunity.

Our point here is not that the defendants in this case are liable for wrongful use of civil proceedings. We agree with the district court that Pennsylvania's Dragonetti Act, 42 Pa. C.S.A. §§ 8351-8356, which codifies this common law tort, gives a cause of action only to the party wrongfully sued — here the Construction Company.[10] Rather, our point is that Pennsylvania would not have the Dragonetti Act if Pennsylvania's judicial privilege protected the filing of an action without probable cause and primarily for a purpose other than to secure relief.[11]

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10. We need not decide whether the Dragonetti Act has preempted this tort. We believe that if the Pennsylvania Supreme Court concluded that the Act did not, it would look to the Restatement (Second) and reach the same result. With respect to preemption, however, we note that there is no basis for asserting that the Dragonetti Act was intended to foreclose liability when all of the elements of the tort of interference with advantageous relations are present. The purpose of the Act was to expand liability for the tort of wrongful use of civil proceedings by eliminating the "English Rule" that required the arrest of the person or seizure of the property as a necessary element of the tort. *Walasavage v. Nationwide*, 633 F. Supp. 378, 379 (E.D. Pa. 1986); 42 Pa. C.S.A. § 8351(b).

11. Appellees cite three cases to support their position that the judicial privilege bars Silver's interference claims. *Pelagatti v. Cohen*, 370 Pa. Super. 422, 536 A.2d 1337 (1987) (ostensibly extending the judicial privilege to interference with existing and prospective relations contractual claims); *Brown v. Delaware Valley Trans. Prog.* 372 Pa. Super. 629, 539 A.2d 1372 (1988) (extending the privilege to civil conspiracy, mutilation of corpse, and assault and battery); *Moses v. McWilliams*, 379 Pa. Super. 150, 549 A.2d 950 (1988) (en banc) (privilege extended to protect doctor for liability from any breach of patient-client confidentiality for his statements made in a medical action brought by patient against another doctor). All these cases, however, are distinguishable in that all the communications at issue in them occurred within the "regular course of justicial proceedings," and protection of them was, accordingly, necessary to permit the proper functioning of the judicial system.

V.

We now turn to appellant's claim for interference with existing contractual relations. As noted above, the Pennsylvania Supreme Court has adopted the Restatement (Second)'s formulation with respect to this tort.[12] *Adler, Barish*, 393 A.2d at 1183. Accordingly, we look to see if Silver has alleged: (1) the existence of one or more contracts; (2) the purpose or intent to harm plaintiff by preventing the completion of the contractual relation(s); (3) conduct by defendant which is not proper as a matter of law and which a factfinder could reasonably find improper; and (4) harm actually resulting from defendants' actions. *See Adler, Barish*, 393 A.2d at 1183; Restatement (Second) § 707 comment 1.

There is no serious dispute that appellant alleged the existence of contracts that were not fulfilled (e.g., the Shermark Partnership, Dayton Manor, and Cumberland Convalescent Center contracts), actual damage to himself individually (e.g., loss of a $100,000 development fee on the Shermark contract, and loss of a 21% equity interest in Dayton Manor estimated at $250,000), and an intent on the part of the defendants to "interfere with the contractual rights of plaintiff." 15a. The principal dispute between the parties is whether appellees' conduct was protected as a matter of law. We conclude that it was not.

We start with the conclusion, earlier reached, that the defendants' filing of the bankruptcy petition was not protected by the judicial privilege. However, that conclusion

---

12. Section 766 of the Restatement (Second) provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

does not end the inquiry under § 767[13] of the Restatement (Second), which defines "improper," because conduct may be proper even if it is not protected by a clearly established privilege. An analysis of § 767's factors demonstrates, however, that the defendants' conduct was not "proper" as a matter of law. Silver alleges a desire by the defendants to bring injury to him and, as comment d to § 767 states, "[a] motive to injure another or to vent one's ill will on him serves no socially useful purpose." Silver's interests with which appellees interfered were socially valuable, providing him with income and contributing to the construction of useful nursing homes. The interest sought to be advanced by the defendants, the "visceral good feeling that we have taken you out of the market . . . ," is not socially desirable. Likewise there is no socially redeeming value to protecting the malicious filing of an involuntary bankruptcy petition. Finally, the defendants and Silver were not competitors, thus comment i's indication that such a relationship deserves greater protection does not apply. In short, Defendant's conduct is neither protected by the judicial privilege, nor otherwise "proper" as a matter of law.

Since the complaint alleges conduct which is not protected as a matter of law, the question of whether defendants' conduct is improper is ultimately one for a factfinder. Restatement (Second) § 767 comment l ("Here, as with negligence, when there is room for different views, the determinations of whether interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question."); *see Breslin v. Vornado*, 559 F. Supp. 187, 191 (E.D. Pa. 1983).

The defendants further urge, in the alternative, that under the Restatement (Second)'s formulation of the tort, a cause of action for interference with contractual relations

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13. *See* supra, note 3.

based on the bringing of an "improper" suit lies only where the suit has been filed against the plaintiff's customers. They suggest that, in the context of this case, this means that the suit against Silver's Construction Company cannot be the basis for an interference with contractual relations claim. To support their position, defendants quote from § 767, comment c:

> A typical example of this situation is the case in which the actor threatens the other's prospective customers with suit for infringement of his patent and either does not believe in the merit of his claim or is determined not to risk an unfavorable judgment and to rely for protection upon the force of his threats and harassment.

We find the defendants' reading of the Restatement unduly restrictive. Comment k of § 766,[14] entitled "Means of Interference," states that there "is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. . . ." This passage and comment c's characterization of the hypothetical case relied on by defendants as "a typical example" indicate that the "improper" suit need not necessarily be filed against a customer in order to provide a predicate for a claim under section 766; any "improper" suit that has the requisite effect on the plaintiff's contractual relations will suffice.[15]

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14. Certain comments of § 766, including comment k, are incorporated by reference into § 767 by comment c of § 767.

15. An "improper" bankruptcy petition against a person holds as much potential for interference with his or her contractual relations as the threatened patent infringement suits in the Restatement example. Although the involuntary bankruptcy petition in this case was filed against the Construction Company and not Silver individually, Silver adequately alleges a causal connection between the filing and injury to him as an individual. Defendants are entitled to challenge these allegations, but they are sufficient to withstand dismissal at this stage.

VI.

Finally, we turn to whether Silver's claim for intentional infliction of severe emotional distress was properly dismissed. The district court did not indicate why it dismissed this claim and, accordingly, we do not know which of the four elements of this tort it believed Silver's pleading failed to satisfy.[16] The defendants advance only two reasons why the dismissal should be upheld: (1) Pennsylvania law does not recognize the tort of intentional infliction of severe emotional distress, and (2) even if it did, the conduct alleged, as a matter of law, is not "outrageous." We find neither contention persuasive.

Although the opinion of the Pennsylvania Supreme Court in *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 527 A.2d 988 (1987) has caused considerable speculation as to whether Pennsylvania will recognize the tort of intentional infliction of severe emotional distress, this court has recently predicted that Pennsylvania's highest court will ultimately embrace it. *Williams v. Guzzardi*, 875 F.2d 46, 51 (3d Cir. 1989). Nothing has since been said by the Supreme Court that causes us to change our prediction on this issue.

"We recognize that Pennsylvania courts have been cautious in permitting recovery for intentional infliction of severe emotional distress," *Williams*, 875 F.2d at 52, and in particular, that conduct, to be found sufficiently "outrageous" to give rise to liability, must be both extreme and

16. Although we recognized in *Williams*, 875 F.2d 46, 52 (1988), that Pennsylvania's formulation of the tort may not exactly track that of the Restatement (Second), we did outline its four elements: 1) the conduct must be extreme and outrageous; 2) the conduct must be intended; 3) the conduct must cause emotional distress; and 4) the distress must be severe. *Id.*; *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979).

very offensive to the moral values of society.[17] Nevertheless, we are unwilling to say that the Pennsylvania courts would find wanting as a matter of law a claim alleging that the defendants threatened the plaintiff with physical injury and the destruction of his business in order to extort money from him and thereafter carried out part of that threat. The Restatement (Second) identifies extortionate threats of this kind as a paradigm of the kind of outrageous behavior that gives rise to liability when it occasions severe emotional distress.[18]

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17. While questioning whether this tort should be recognized in Pennsylvania, the *Kazatsky* court accepted the Restatement (Second)'s definition of "outrageous":

> "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

527 A.2d at 991 (quoting the Restatement (Second) § 46 comment d).

18. Illustration 2 to Comment d of § 46 posits the following hypothetical case:

> 2. A, the president of an association of rubbish collectors, summons B to a meeting of the association, and in the presence of an intimidating group of associates tells B that B has been collecting rubbish in territory which the association regards as exclusively allocated to one if its members. A demands that B pay over the proceeds of his rubbish collection, and tells B that if he does not do so the association will beat him up, destroy his truck, and put him out of business. B is badly frightened, and suffers severe emotional distress. A is subject to liability to B for his emotional distress, and if it results in illness, A is also subject to liability to B for his illness.

VII.

To summarize, we have concluded that Silver must be permitted to go forward on Count I (interference with existing contractual relations), Count II (interference with prospective contractual relations), and Count V (intentional infliction of severe emotional distress).[19] While our opinion has not engaged in an independent analysis of Count III (wrongful use of civil proceedings), Count IV (RICO), and Count VI (negligence), we have further concluded that the district court properly dismissed those counts. Accordingly, we will reverse the judgment of the district court and remand for further proceedings on Counts I, II, and V consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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19. The plaintiff alleged in Count V that the defendants' actions "were made with the specific intention of inflicting severe emotional distress," and in fact caused him to suffer "personal embarrassment, humiliation and severe mental and emotional harm, distress and suffering." 21a-22a. The plaintiff's allegations are sufficient in this case to withstand a motion to dismiss. However, to survive a motion for summary judgment, the plaintiff must still present "competent medical evidence of causation and severity" of his emotional distress, as well as proof that the alleged conduct was "both intentional and outrageous." *Williams*, 872 F.2d at 25.

No. 89-1645

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

M. MARK MENDEL,
DANIEL E. MURRAY, and M. MARK MENDEL, LTD.,
Petitioners,

v.

MARC I. SILVER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

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Respondent.

COUNTERSTATEMENT OF CASE

Respondent, Marc I. Silver, made his living in the construction business, principally building nursing homes. Mr. Silver's income was derived not only from his construction businesses, but also from consulting fees paid by developers and owners of nursing homes and by equity participations with owners and developers of nursing homes. One of the subcontractors that worked for Mr. Silver was Barton Engineering ("Barton"). Petitioner M. Mark Mendel occupied the positions of owner, officer, and Chairman of the Board of Barton, and Petitioner Daniel E. Murray was also an officer of Barton. In late June of 1984 M. Mark Mendel, acting as owner and Chairman of the Board of Barton, commenced a series of meetings, phone conversations, and correspondence in which he threatened to destroy

Mr. Silver's business, to destroy his ability to earn a living, and to have Mr. Silver physically injured. Mr. Mendel confirmed in writing that these threats were made "after careful deliberation and evaluation." Petition for Writ of Certiorari ("Petition for Certiorari"), at 13A.

In December of 1984 Mr. Mendel made good on his threats to put Mr. Silver out of business. Petitioners M. Mark Mendel and Daniel E. Murray and Mr. Mendel's law firm filed a Petition for Involuntary Bankruptcy in Barton's name. They included on the Petition the names of two other creditors, neither of whom they ever represented and neither of whom had authorized the petitioners to file the Involuntary Bankruptcy Petition in their name. The Petition was ultimately dismissed because the petitioning creditors failed to post a bond as directed by the Bankruptcy Court, but the damage had been done. The filing of the Petition in and of itself resulted in widespread dissemination of Mr. Silver's alleged bankruptcy, and rendered Mr. Silver unable to obtain performance bonds necessary to carry on his contracting business. As a result, Mr. Silver personally lost development fees and equity interests for which he had been negotiating, he was prevented from the completion of certain contracts, and other contracts then in negotiation fell through. Additionally, Mr. Silver suffered personal embarrassment, humiliation, and severe mental and emotional distress. Petition for Certiorari, at 13A–14A.

Mr. Silver filed a six count Complaint. Count I alleged that Petitioners filed the Involuntary Bankruptcy Petition and publicized Mr. Silver's alleged bankruptcy with the knowledge and purpose to interfere with the contractual rights of Mr. Silver and with the intent to harm Mr. Silver. The Complaint identified specific contracts as having been lost as a result of the filing of the fraudulent Involuntary Bankruptcy Petition. Count II alleged that Mr. Silver had personally established a

reputation in the nursing home construction business, that he had developed a working relationship with developers and owners, and that, as a result of Petitioners' misconduct, Silver lost prospective consulting contracts and equity participations. Again, specific prospective contractual relationships were identified as having been destroyed by the Petitioners. Count III alleged a violation of a state statute defining the tort of wrongful use of civil proceedings. Count IV alleged RICO violations, specifying numerous predicate acts.[1] Count V stated a claim for intentional infliction of emotional distress, and Count VI a claim for negligence.

On March 25, 1987 the district court granted the Petitioners' motion to dismiss Counts I, II, IV, V, and VI, with only Count III remaining. Thus, the Order of March 25, 1987 was not a final Order. A request for certification of that Order under Rule 54(b) F.R.Civ.P. was denied.

By Order dated November 21, 1988 the district court granted Petitioners' motion for *judgment* on the pleadings, dismissed Count III of Respondent's Complaint, denied Respondent's motion to reinstate Counts I and II, and, because all claims had been fully and finally resolved in favor of Petitioners and against Respondent, entered a final and appealable *judgment*. The November 21, 1988 Order states:

> "AND NOW, this 18th day of NOVEMBER, 1988, upon consideration of the defendants' motion for judgment on the pleadings and the plaintiff's cross motion to reinstate Counts I and II, it is

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1. The RICO claims were previously before this Court in a companion case captioned *Marshall-Silver Construction Company, Inc. and Silver Construction Company, Inc. v. M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd.*, No. 88-7103 (*"Marshall Silver"*). The Court granted Marshall-Silver's Petition for Certiorari and vacated and remanded for reconsideration in light of *H.J., Inc. v Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). That Order is reported at 109 S. Ct. 3233-34 (1989).

ORDERED

1. that defendants' motion is GRANTED and *JUDGMENT is entered in favor of the defendants M. Mark Mendel, Individually, Daniel Murray, Individually, and M. Mark Mendel, Ltd. and against the plaintiff Marc I. Silver.*

2. that the plaintiff's motion to reinstate Counts I and II is DENIED.

(Emphasis added)

On December 13, 1988 Mr. Silver filed a Notice of Appeal which reads as follows:

> "Notice is hereby given that Marc I. Silver, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit *from the Order entered in this action on November 21, 1988.* A copy of the Memorandum and Order entered on November 21, 1988 is attached hereto." (Emphasis added).

On December 21, 1988, the thirtieth day after the entry of the Court's November 21, 1988 judgment, Mr. Silver filed and served on Petitioners the Civil Appeal Information Statement (*See* page A-1, *infra*) which, under the heading "Issues Proposed To Be Raised On Appeal", read as follows:

> "(1) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted – and in later refusing to reinstate – the claims for interference with contractual relations, both without explanation?
>
> (2) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the negligence claim without explanation?

(3) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the claim for malicious prosecution?

(4) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the RICO claim?"

Further specificity was supplied six days later in the Statement of Issues Proposed to Be Presented on Appeal (see page A-2, *infra*).

Petitioners moved to dismiss Respondent's appeal insofar as it sought review of the non-final Order of March 25, 1987. The Motion to Dismiss was referred to the Merits Panel, decided by the Third Circuit after full briefing and oral argument, and is discussed in Section III of the Third Circuit Opinion. *See* Petition for Certiorari, 14A-15A. The Third Circuit held that the Notice of Appeal fully complied with Rule 3(c), F.R.A.P., and that review of the November 21, 1988 Order that entered *judgment* in petitioners' favor included a review of all decisions of the district court necessary to that judgment.

The Third Circuit then considered on the merits the various counts of the Complaint, reversed the judgment of the district court with respect to Counts I, II, and V and remanded for further proceedings. Since Respondent had fully complied with Rule 3(c), the Court found no occasion to address the doctrine of harmless error or this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

Contrary to the assertions made by Petitioners, there is no conflict among the Circuits with respect to the application of Rule 3(c), F.R.A.P., to the Notice of Appeal specifying an appeal from the order that entered final judgment in this case. With respect to the substantive law issues raised by the Petition for Certiorari, reference to the Third Circuit Opinion discloses that the Third Circuit specifically followed the decisions of the

STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

1. (a) Is a lawyer privileged or immune from suit for interference with contractual relations or prospective contractual relations?

   (b) Is a businessman privileged or immune from suit for interference with contractual relations or prospective contractual relations?

2. (a) Is a lawyer privileged or immune from suit for wrongful use of civil proceedings?

   (b) Is a businessman privileged or immune from suit for wrongful use of civil proceedings?

3. (a) Is a lawyer privileged or immune from suit for intentional infliction of emotional distress?

   (b) Is a businessman privileged or immune from suit for intentional infliction of emotional distress?

4. Does the sole shareholder of a corporation have standing to maintain an action for wrongful use of civil proceedings against persons, who by means of false and fraudulent pleadings and sworn testimony commenced and attempted to prosecute, an involuntary bankruptcy which destroyed his corporation and his personal livelihood?

5. Is the businessman privileged or immune from liability for acts of negligence carried out in his capacity as a businessman merely because he is also a lawyer?

6. Did the District Court err in dismissing (without opinion) plaintiff's RICO claim where the Complaint alleged that:

(a) Defendants conducted an enterprise (distinct from the defendants themselves) through a pattern of racketeering activity?

(b) Defendants committed predicate acts of obstruction of justice, mail fraud, threats made both in person and through the mails, the filing of a fraudulent Petition for Involuntary Bankruptcy, false testimony under oath during a Bankruptcy Hearing, and violations of the Pennsylvania statutes outlawing conspiracy and attempted theft by extortion and the making of false and misleading statements; and

(c) Defendants' conduct resulted in injury to plaintiff's business and property (in this case destruction of plaintiff's livelihood).

7. In the alternative, did the District Court err by not permitting Appellant leave to amend his Complaint where plaintiff in his Brief offered to amend the Complaint to meet with most restrictive definition of a "pattern of racketeering" even though this Court has not required such restrictive pleading?